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IN THE

Supreme Court of the United States

October Term, 1964

(Now Number 195, October Term, 1965)

FRED DE LUCIA and SALVATOR MONTELLA,

Petitioners,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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INDEX

	PAGE
A. Statement	1
B. The Grounds Upon Which the Jurisdiction of This Court is Invoked	2
C. The Questions Presented for Review	2
D. Constitutional Provision and Statute Involved	3
E. A Concise Statement of the Case and Material Facts Pertaining to the Consideration of the Questions Presented	3
Statement of Pertinent Facts	5
POINT I—There has been no violation of any provision of the Constitution of the United States	9
POINT II—The issues were not properly raised or preserved	12
CONCLUSION	13
APPENDIX A—Opinion of the Trial Justice	1a
APPENDIX B—Opinions of the New York State Court of Appeals	4a
APPENDIX C	8a
APPENDIX D	9a
APPENDIX E—Judgment of the Court of Appeals	10a

Authorities Cited

Cases

	PAGE
Brown v. Mississippi, 297 U.S. 278	10
Bute v. Illinois, 333 U.S. 640	10
Cafeteria and Restaurant Workers Union, Local 473, AFL-CIO v. McElroy, 367 U.S. 886, 81 S. Ct. 1743	11
Herbert v. Louisiana, 272 U.S. 312	9
In re Coates, 9 N.Y. 2d 242, appeal dismissed, 368 U.S. 34	11
Lyons v. Goldstein, 290 N.Y. 19	11
People v. Berkowitz, 14 M. 2d 384, affirmed 7 A.D. 2d 1031	11
Schwartz' Estate v. Dunishtock, 175 Misc. 860	11

Statutes

28 U.S.C. §1257(3)	2
New York State Code of Criminal Procedure:	
§411	3, 12
§465	3, 12

Rules

Rules 19, Subdivision 1 of Supreme Court	2

United States Constitution

Fourteenth Amendment	2, 3, 12

IN THE

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THE PEOPLE OF THE STATE OF NEW YORK,

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

This brief is submitted in opposition to the petition for a writ of certiorari to review the judgment of the Court of Appeals of the State of New York entered in the above-entitled case on March 18, 1965 (15 N.Y. 2d 294).

A. Statement

Petitioner seeks a writ of certiorari in order to review a judgment of the Court of Appeals of the State of New York entered on March 18, 1965 (15 N.Y. 2d 294).

On appeal to the Appellate Division of the Supreme Court in and for the Second Judicial Department of the State of New York the judgment and order appealed from were affirmed without opinion (21 A.D 2d 805).

Upon appeal to the Court of Appeals of the State of New York the judgment of the Appellate Division was affirmed

by a divided Court, four (4) Judges voting to affirm the judgment and order below and three (3) Judges dissenting. Said opinion is reported at 15 N.Y. 2d 294. Copies thereof are attached to this brief as Appendix B.

There were no other opinions written in connection with the case.

B. The Grounds Upon Which the Jurisdiction of This Court Is Invoked

Jurisdiction in this Court is invoked under Title 28, U.S. Code §1257 (3) and Rule 19, Subdivision 1 of the rules of this Court.

The judgment sought to be reviewed herein is the judgment of the Court of Appeals of the State of New York (15 N.Y. 2d 294) made on March 18th, 1965 as aforesaid, and annexed hereto as Appendix E.

C. The Questions Presented for Review

1) Were petitioners deprived of due process of law in violation of the Fourteenth Amendment to the United States Constitution in that they were deprived of a basic protective right to a fair trial where several jurors, in contravention of the New York State Code of Criminal Procedure, and acting without the knowledge or authority of the Court or counsel, went to the alleged scene of the crime, investigated there to check on the arresting officers' testimony, and reported their findings to the fellow members of the jury?

2) Were petitioners deprived of due process of law in violation of the Fourteenth Amendment to the United States Constitution in that they were deprived of the basic protective right to a fair trial by being denied a hearing as to the alleged misconduct by the jurors who in contravention of the New York State Code of Criminal Procedure, and acting without the knowledge or authority of the Court or counsel, went to the alleged scene of the crime, investigated there to check on the arresting officers' testimony, and reported their findings to the fellow members of the jury?

D. Constitutional Provision and Statute Involved

The constitutional provision involved is the due process clause of the Fourteenth Amendment to the United States Constitution. The statutes involved are §465 and §411 of the Code of Criminal Procedure of the State of New York.

Each of the foregoing is set forth verbatim in Appendices C and D respectively of this petition.

E. A Concise Statement of the Case and Material Facts Pertaining to the Consideration of the Questions Presented

Petitioners were indicted by a Grand Jury in Kings County in the State of New York for the crimes of attempted burglary in the third degree and possession of burglar's instruments. They were tried in the Supreme Court of the State of New York, Queens County, upon said indictment, before Honorable Peter T. Farrell, a Justice

of said Court, and a jury. They were convicted as charged in the indictment by the verdict of a jury after trial. Subsequent to the jury verdict, an application was made by the attorney for the petitioners for a new trial. The basis of the application were statements made by the attorney for the petitioners of conversations he had with members of the jury, and the attorney stated that several of the jurors had informed him that they had visited the scene of the crime the night before the case was submitted to them for deliberation, and that the visit was without knowledge or authority of the Court or counsel. This motion was denied on June 12, 1963 by Mr. Justice Farrell, and the opinion is appended hereto as Appendix A.

The motion was denied on the grounds that:

(1) An unauthorized visit to the place of the crime will not require a new trial if the jurors were not guilty of misconduct while there and if they could not have acquired any improper information that might have influenced their verdict.

(2) That jurors cannot impeach their verdict and even more so they cannot do it by the unsworn statement of others.

An appeal was then taken to the Appellate Division of the Supreme Court of the State of New York in the Second Judicial Department from this order. While the trial proceeded and application was made for re-argument and in the re-argument the petitioners submitted affidavits from five of the twelve jurors. This motion for re-argument was granted and upon the re-argument the Court adhered to its original decision of June 13, 1963.

The Appellate Division affirmed the conviction without opinion. The Court of Appeals affirmed the conviction and the opinions of the Court are set forth in Appendix B.

Statement of Pertinent Facts

JOHN FRANCIS MCGUIRE testified that he and Norton Peppis ran a restaurant and night club at 120-20 Queens Boulevard, in Queens, known as Pep-McGuire's (20-21, 35). He closed the restaurant at about 4:30 A.M. on Monday morning, May 14th and had checked and locked the windows and the two doors (22) and when he returned later in the morning, the doors were locked, but the metal rear exit door was loose at the bottom, leaving an open space of an inch and a half (23-24, 40, 49). This condition was not so when he had left that morning (26). There were also markings and indentations on the door and sash (26-27, 42). He had used that door, but never saw the indentations before (43, 154). He did not give the defendants permission to enter the premises (27). The rear door opened into a stairway which opened on to a pathway which led from Queens Boulevard to the stairway door and then to the next street (31-32, 41-42).

DET. JOSEPH SZARWAS testified that he was in the vicinity of 120-20 Queens Boulevard at about 5:30 A.M. on May 14, 1962. He observed the defendants riding in a 1956 Cadillac. The car slowed near Pep-McGuire's and then continued (66-67, 185, 187). The detective watched the alleyway and ten minutes later saw the defendants in the alleyway going towards Queens Boulevard from the next street (68, 190) and then saw the defendant Montella open the building side door and both defendants entered the building (70-71, 191-

192). The detective and his brother officers, Detective Goggin and Lt. Lester, moved towards the door. Szarwas saw DeLucia inside looking out. Szarwas opened the door, told the defendant, DeLucia to stay there, and went up the stairs to a landing where Montella stood with a screw driver jammed between the restaurant door and the door frame. Montella pulled the screw driver out and dropped it at his feet, from where Szarwas picked it up. The officer searched Montella and found a flashlight in his left outer coat pocket (72, 90, 199, 201-203, 208). The bottom of the door was pulled out from the jamb and there were about fifteen or twenty sharp edged indentations in the jamb and the door (92). At the indentations, the paint was chipped away and orange paint showed (92, 93). Szarwas asked Montella for his car keys and Montella said he had no keys and had no match. The Cadillac was located about a block away, the keys were under the driver's seat and Montella's identification was found in a wallet in the glove compartment (94, 121). The detective identified the screw driver as a burglar's tool (96, 213, 218-219). The police laboratory report was marked defendants' Exhibit C. It stated that an examination of the foot end of the screw driver disclosed green, gold, maroon and orange paint. The door was painted green and had layers of gold, maroon and orange which was microscopically similar to the paint on the screw driver (165). Based on physical measurements, the tool marks on the door would have been caused by the screw driver, but there were insufficient microscopic comparative points to make a determination (165).

(In the absence of the jury, DeLucia admitted a prior conviction upon his arraignment on a prior Offense Information (100)).

Detective Francis J. Goggin testified that at the time and place he was with Lt. Lester and Detective Szarwas and followed Detective Szarwas into the alleyway and doorway and saw defendant DeLucia at the inside of the door and saw Detective Szarwas on the landing with Montella (238-239, 249-250-254). DeLucia said to him, "The only thing you got us for is loitering" (240, 258). Goggin heard something drop and then saw Szarwas pick up a screw driver from the floor at the landing (255-256).

Lt. Edward J. Lester testified that after both defendants and Detective Goggin were in his car, DeLucia said, "Can't we straighten this thing out?" and Montella said, "Isn't there something we can do about this?" (276-278)

Norton Peppis testified for the defense. He was a part owner of Pep-McGuire's restaurant. During the night of May 13-14, the bandleader introduced him to the defendants and two girls who were in the restaurant (286-287). The following morning he entered the restaurant through the front door and opened the padlock on the back door (292). The back door was loose and old and there were marks on it from before and he couldn't tell the difference (294, 296-297, 317, 323).

Andrew Senatore testified that he was the Pep-McGuire bandleader. The defendants and two girls came in at about 11:30 P.M. and he said good night to them when he left at 3:00 A.M. (326-328).

Kathleen Levisenkoff testified that she and another girl met the defendants at a cocktail lounge at 10:00 P.M. Then she and her girl friend left in her car and went to Pep-McGuire's where they met the defendants again (330-332). They stayed there until 4:00 A.M. and then went in her car

to a diner where they stayed for an hour. She then dropped off both defendants in front of Pep-McGuire's. The defendants had a black Cadillac (334, 336).

The defendant Montella testified in his own defense. He was never convicted of a crime, he never touched the rear door and he didn't own the screw driver (338). He had been at Pep-McGuire's for four and a half hours until closing time and then went to a diner and left the diner close to 5:30 A.M. He had parked his sister's 1956 Cadillac about a block away from Pep-McGuire's and then walked through the alleyway from Kew Gardens Roads to Queens Boulevard and had met the girls in front of Pep-McGuire's (339-341). The girl was to take them to their car but continued on Queens Boulevard. They got out of the car and started through the alleyway to get to their car when the detectives approached from the front and from the back and shoved them into the hallway (342-343). At first he said the screw driver was in the detective's hand (343), but then said that he did not see the screw driver until it was at his feet at a point a foot or two past the outer door. He did not see anyone put the screw driver there (358-360). The flashlight was in the glove compartment of his sister's car (345). The sister lived in Staten Island. He had her auto on Friday, Saturday and Sunday. Before he went to Pep-McGuire's he left the keys under the mat and the wallet in the car's glove compartment (348-349). He did not tell the detectives what kind of a car he had or where he had parked it (363). Shown a photo of the alley, he could not point out there where one could see from the alleyway to the other street (351-353).

POINT I

There has been no violation of any provision of the Constitution of the United States.

It is submitted as set forth in *Herbert* v. *Louisiana,* 272 U.S. 312, 316-317.

> "The due process of law clause in the Fourteenth Amendment does not take up the statutes of the several states and make them the test of what it requires: nor does it enable this Court to revise the decisions of the state courts on questions of state law. What it does require is that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions and not infrequently are designated as 'law of the land'. Those principles are applicable alike in all the states and do not depend upon or vary with local legislation." *Herbert* v. *Louisiana,* 272 U.S. 312, 316-317.

This Court has never attempted to define with precision the words "due process of law", nor is it necessary to do so in this case. It is sufficient to say that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the union may disregard, as that no man shall be condemned in his person or property without due notice and an opportunity of being heard in his defense. *Holden* v. *Hardy,* 169 U.S. 366, 389-390.

The foregoing statements were referred to with approval in *Powell* v. *Alabama, supra,* at pp. 67, 71-72. The present case, on the other hand, illustrates equally well the kind of judgments by a state court that should not be invalidated as lacking in the due process of law required by the Fourteenth

Amendment. This is so, although the procedure followed, in 1938, by the state court in the instant cases, as to counsel for the accused might not have satisfied the practice then required of a federal court in the case of comparable federal crimes. The Fourteenth Amendment, however, does not say that no state shall deprive any person of liberty without following the federal process of law as prescribed for the federal courts in comparable federal cases. It says merely "nor shall any state deprive any person of life, liberty, or property, without due process of law; . . ." This due process is not an equivalent for the process of the federal courts or for the process of any particular state. It has reference rather to a standard of process that may cover any varieties of processes that are expressive of differing combinations of historical or modern, local or other judicial standards, provided they do not conflict with the "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions . . ." *Herbert* v. *Louisiana, supra,* at p. 316. This clause in the Fourteenth Amendment leaves room for much of the freedom which, under the Constitution of the United States and in accordance with its purposes, was originally reserved to the states for their own control over the procedure to be followed in criminal trials in their respective courts. It recognizes that differences arise naturally between the procedures in the state courts and those in the federal courts. *Bute* v. *Illinois,* 333 U.S. 640, 648-50.

The state may regulate the procedure of its courts in accord with its own conceptions of justice, unless in doing so it violates basic dictates of due process of law. *Brown* v. *Mississippi,* 297 U.S. 278. The exact meaning and scope of

the phrase due process of law has never been decided with precision but requires an orderly procedure adapted to the nature of the case including the opportunity to be heard and offer a defense or explanation at a hearing or trial. However, no particular type of form or method of state procedure is mandated. *In re Coates,* 9 N.Y. 2d 242, appeal dismissed, 368 U.S. 34; *Lyons* v. *Goldstein,* 290 N.Y. 19; *Schwartz' Estate* v. *Dunishtock,* 175 Misc. 860; *People* v. *Berkowitz,* 14 M. 2d 384, affirmed 7 A.D. 2d 1031.

The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation but is unfixed and based upon considerations of time, history, reason, and past course of decisions. *Cafeteria and Restaurant Workers Union, Local 473, AFL-CIO* v. *McElroy,* 367 U.S. 886, 81 S. Ct. 1743.

The Court of Appeals has effectively ruled in the case at bar that there has been no violation of any right of defendant. That there is an overriding concept that jurors may not impeach their own duly rendered verdict and that these particular defendants, the petitioners herein were not prejudiced in a substantial right affecting the verdict. A fair trial was afforded the petitioners; they received able representation; and they were not in any way prejudiced by the actions of the Court nor by any purported misconduct of the jury.

Under the doctrine that a state may regulate procedures of its own criminal proceedings in keeping with its own sense of justice and fairness it cannot be said that petitioner received anything but a fair trial free from error of constitutional magnitude.

POINT II

The issues were not properly raised or preserved.

Respondent submits that the petitioners objected to the verdict of the jury on the grounds that it violated sections 411 and 465 of the Code of Criminal Procedure of the State of New York. It is submitted that as is evidenced by the record herein the issue of denial of due process of the 14th Amendment of the United States Constitution was not raised upon a motion for a new trial, nor upon motion for re-argument of the order denying them their motion for a new trial. It is further submitted, that, as the record will demonstrate, the issue of denial of due process and the issue of violation of the 14th Amendment were not specifically raised in the Appellate Dvision nor in the Court of Appeals. The sole attack throughout is the question of whether or not there has been a violation of the particular statutes involved.

CONCLUSION

The writ of ceriorari prayed for should be denied.

Dated: Queens, N.Y.
July , 1965

Respectfully submitted,

FRANK D. O'CONNOR
Attorney for Respondents

BENJ. J. JACOBSON
Member of the Bar of
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EUGENE FELDMAN

APPENDIX A

Opinion of the Trial Justice

SUPREME COURT

QUEENS COUNTY

CRIMINAL TERM, PART I

By

PETER T. FARRELL, *J.*

Dated June 13th, 1963

122-63 superseding Ind. No. 878-62

THE PEOPLE OF THE STATE OF NEW YORK

—against—

FRED DE LUCIA
SALVATORE MONTELLA

Defendants.

This is a motion by the defendants for an order setting aside the verdict of guilty and granting a new trial to the defendants upon the ground that the jury violated Sec. 465, subd. 2 and 3, of the Code of Criminal Procedure.

Defendants were convicted on May 2, 1963 by the verdict of a jury of the crimes of Attempted Burglary in the Third Degree and Possession of Burglars Instruments as a Felony as to De Lucia, and Attempted Burglary in the Third Degree and Possession of Burglars Instruments as a Misdemeanor as to Montella.

Appendix A—Opinion of the Trial Justice

The defendants allege, in substance, that during the trial and without direction of the Court, pursuant to Sec. 411 of the Code of Criminal Procedure, the jury visited the scene of the alleged crime and conducted thereat their own experiments in receiving and evaluating evidence.

Defendants by their affidavits submitted in support of this motion and by oral argument in open Court base their allegations only upon information and statements of jurors who rendered judgment in this matter.

It is well established law that the fact that the jury made an unauthorized visit to the place of the crime will not require a new trial, if they were not guilty of misconduct while there, and could not have acquired any improper information that might have influenced their verdict. (24 C.J.S. Criminal Law, Sec. 1449(14) p. 135; People v. Kraus, 147 Misc. 906; Haight v. City of Elmira, 42 N.Y. 391)

> "It is incumbent on the defendant to show that the facts bring the case within the provisions of Sec. 465 of the Code of Criminal Procedure, and that his substantial rights have been prejudiced by the misconduct of a juror or jurors about which the defendant complained." (People v. Kraus, supra)

It is also well settled law that jurors cannot by their affidavits, or testimony, even though these affidavits aver their misconduct outside of the jury room, impeach, attack, or discredit the verdict which they have in fact recorded and rendered. Much less can they do so by their unsworn statements presented through the affidavits of others. (People v. Sprague, 217 N.Y. 373, 384; Tartacower v. New York City Transit Authority, 9 Misc. 2d 606, 608; Fisch on New York

Evidence, Sec. 305, pp. 305, 306; Richardson on Evidence, 8th Edition, Sec. 423)

The sound reasoning for this rule is set down as follows in Payne v. Burke, 236 App. Div. 525, 529; "The reason for this rule is founded on sound public policy. If jurors, after they have been discharged and have mingled with the public, were permitted to discredit the verdict which they had solemnly rendered in open Court, no verdict would be safe, and judgments would rest on a very uncertain foundation. The consequences of such practice would be most mischievous; it would open the door for tampering with jurors and would make it easy for a corrupt or dissatisfied juror to destroy the very verdict to which he had deliberately given his assent under the sanction of an oath. Jurors would constantly be importuned by dissatisfied litigants and pressed for affidavits upon which their verdict might be assailed. Every trial lawyer knows full well how easy it would be to find some complacent juror who would yield to such appeal. If such practice were countenanced few, if any, verdicts would survive, and there would be no end to litigation."

Since defendants have indicated no other means to substantiate their claims and since the evidence by which the defendants intend to establish their contentions is inadmissible as a matter of law, this motion must in all respects be denied.

Order entered accordingly.

The clerk of the Court is directed to mail a copy of the decision and order to the attorneys for the defendants.

PETER T FARRELL

J. S. C.

APPENDIX B

Opinions of the New York State Court of Appeals

STATE OF NEW YORK
COURT OF APPEALS

2

No. 501

THE PEOPLE &c.,

Respondent,

vs.

FRED DELUCIA and SALVATOR MONTELLA,

Appellants.

DYE, J.:

In this joint appeal by permission, the appellants contend that the affirmance in the court below of the trial court's order denying their motion to set aside the verdict and for a new trial amount to reversible error. The motion was based on an affidavit by defendant's trial counsel in which he referred to statements allegedly made to him by certain of the jurors shortly after the verdict had been rendered, to the effect that they had viewed the premises where the crime was allegedly committed for the purpose of more easily understanding the evidence. There is no allegation that the jurors involved met or spoke with anyone except each other. The premises in question, at 120-20 Queens Boulevard in the Borough of Queens, are across the street

and about one block away from the court house where the trial was held. It has long been familiar law that jurors may not impeach their own duly rendered verdict by statements or testimony averring their own misconduct within or without the jury room; much less can they do so by statements presented in the form of hearsay affidavits (*People* v. *Sprague,* 217 N. Y. 373; *Dalrymple* v. *Williams,* 63 N. Y. 361; Fisch on New York Evidence, § 305; Richardson on Evidence, 8th Ed., § 432). The rule is founded on sound public policy (*Payne* v. *Burke,* 236 App. Div. 525 followed and cited with approval in *McDonald* v. *Pless,* 238 U. S. 264) which the courts have applied to preclude a juror from testifying as to his own misconduct (cf. *Haight* v. *City of Elmira,* 42 App. Div. 391). Even though an unauthorized view of such premises is improper it is not, without more, such an impropriety as to require the granting of a new trial (*People* v. *Johnson,* 110 N. Y. 134; *People* v. *Klein,* 213 App. Div. 66; See 58 A L R 2d 1147). Absent any competent proof that the defendant was prejudiced in a substantial right affecting the verdict, the motion was properly denied (Code of Crim. Pro., § 465; cf. *People* v. *Kraus,* 147 Misc. 906).

Other assigned errors need not detain us. We are satisfied that the proof adduced was sufficient as matter of law to support the judgment of conviction of each defendant on both counts of the indictment. Nor do we find that any error was committed with respect to the arresting officer's testimony on identification from which it might be inferred that the defendant DeLucia had a prior criminal record.

The judgment of conviction should be affirmed.

Appendix B—Opinions of the New York State Court of Appeals

DESMOND, Ch. J. (dissenting):

The catch-phrase "jurors may not impeach their verdict" does not dispose of the proof that these jurors, depriving defendant of a basic protective right, went on their own to the crime scene, investigated there to check on the officers' testimony and reported back to their fellow members of the jury, all without the knowledge of court or counsel. The rule prohibiting self-impeachment by jurors is stretched too far and in the wrong direction when it is used to validate such a transgression of fundamental fair trial rules.

The rule has been so applied on occasion in some lower courts (*Clum* v. *Smith*, 5 Hill 560; *Sindle* v. *761 Ninth Ave. Corp.*, 127 N. Y. S. 2d 258, affd. 283 App. Div. 939; *Tartacover* v. *Transit Authority*, 169 N. Y. S. 2d 695; also perhaps in *Haight* v. *City of Elmira*, 42 App. Div. 391, 395). There is no doubt, however, that the rule and its purposes primarily and reasonably relate to affidavits or statements by jurors describing jury room deliberations and methods of arriving at verdicts and error or misconduct or mistake in doing so (*Dalrymple* v. *Williams*, 63 N. Y. 361, 363; *Slater* v. *United Traction Co.*, 172 App. Div. 404, 405; *Stein* v. *New York*, 346 U. S. 156, 178). As Wigmore puts it (vol. 8, McNaughton revision, § 2349), the effort is to protect against the jurors being questioned after verdicts as to their methods of decision or their motives, beliefs, intentions or understandings. Wigmore points out (see §§ 2353-2354). that it is anomalous that in most States while the affidavits of jurors cannot be used to go behind the verdict itself, nonetheless an illegal view by jurors is a ground for setting

aside a verdict (see Code Crim. Pro., § 465) if the fact be established by someone other than a juror. There is an interesting opinion by Justice Brennan in *State* v. *Kociolek* (20 N. J. 92, 98-100) in which he reminds us that the early common law had none of these prohibitions and that when the rule against impeachment was adopted in England it expressed only a policy against post-trial questioning of jurors as to how they arrived at their verdict. As Justice Brennan shows, this policy does not reasonably apply to proof that jurors without authority went out and procured illegal evidence on which they acted.

Without destroying the rule where it properly applies we should hold that it does not apply to a situation like this where the investigation is not as to what happened in the jury room or why, but as to a fact (illegal view) which has always been considered to be a strong ground for setting aside a verdict (see Code Crim. Pro., § 465, *supra; People* v. *Gallo*, 149 N. Y. 106, 114 et seq.).

I would reverse and send the case back to the trial judge to hold a hearing to determine whether a new trial should be granted on proof that certain jurors visited and inspected the scene of the alleged crime.

* * * * *

Judgments affirmed. Opinion by Dye, *J.* All concur except Desmond, *Ch. J.*, who dissents in an opinion in which Fuld and Burke, *JJ.*, concur.

APPENDIX C

AMENDMENT XIV TO THE UNITED STATES CONSTITUTION

"Section 1. * * * nor shall any state deprive any person of life, liberty, or property without due process of law * * *."

APPENDIX D

CODE OF CRIMINAL PROCEDURE SECTION 411

"View of premises, when ordered, and how conducted. When, in the opinion of the court, it is proper that the jury should review the place in which the crime is charged to have been committed, or in which any material fact occurred, it may order the jury to be conducted, in a body, under charge of proper officers, to the place, which must be shown to them by a judge of the court, or by a person appointed by the court for that purpose."

CODE OF CRIMINAL PROCEDURE SECTION 465

"In what cases granted. The court in which a trial has been had upon an issue of fact has power to grant a new trial, when a verdict has been rendered against the defendant, by which his substantial rights have been prejudiced, upon his application, in the following cases:

* * * * *

2. When the jury has received evidence out of court, other than that resulting from a view, as provided in section four hundred and eleven;

3. When the jury * * * have been guilty of any misconduct by which a fair and due consideration of the case has been prevented;" * * *

APPENDIX E

Judgment of the Court of Appeals

COURT OF APPEALS

STATE OF NEW YORK, *ss.*:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 18th day of March in the year of our Lord one thousand nine hundred and sixty-five, before the Judges of said Court.

WITNESS,

The HON. CHARLES S. DESMOND,
Chief Judge, Presiding

RAYMOND J. CANNON, *Clerk.*

REMITTITUR March 18, 1965.

2

No. 501

THE PEOPLE &c.,

Respondent,

vs.

FRED DELUCIA and SALVATOR MONTELLA,

Appellants.

Appendix E—Judgment of the Court of Appeals

BE IT REMEMBERED, That on the 23rd day of December in the year of our Lord one thousand nine hundred and sixty-four, Fred DeLucia and Salvator Montella, the appellants in this cause, came here unto the Court of Appeals, by Evseroff, Newman & Sonenshine, their attorneys, and filed in the said Court a Notice of Appeal and return thereto from the judgments of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And The People &c., the respondent in said cause, afterwards appeared in said Court of Appeals by Frank D. O'Connor, District Attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. William Sonenshine, of counsel for the appellants, and by Mr. Harvey B. Ehrlich, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgments of the Appellate Division of the Supreme Court appealed from herein be and the same hereby are affirmed.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said judgments be affirmed, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said

Appendix E—Judgment of the Court of Appeals

Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, and so forth.

/s/ Raymond J. Cannon
Clerk of the Court of Appeals of the State of New York

Appendix E—Judgment of the Court of Appeals

COURT OF APPEALS

CLERK'S OFFICE

Albany, March 18, 1965

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

/s/ RAYMOND J. CANNON
Clerk

(Seal)

No. D 13380

STATE OF NEW YORK,
COUNTY OF QUEENS, *ss.*:

I, PAUL LIVOTI, Clerk of the County of Queens and Clerk of the Supreme Court and County Court in and for said County, the same being courts of record having a seal, DO HEREBY CERTIFY that I have compared the annexed with the original Order Affirming Judgment—Peo. of the State of New York vs. Fred DeLucia and Salvatore Montella filed or entered in my office April 26, 1965 and that the same is a true transcript thereof, and of the whole of such original.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said County and Court this day of May 25, 1965.

/s/ PAUL LIVOTI
Clerk